United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

B

75-2087 P/S

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
RONALD MILLER,

Appellant,

-against-

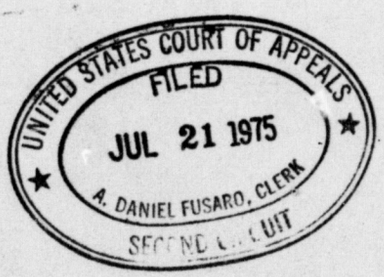
LEON J. VINCENT, Superintendent,
Green Haven Correctional Facility,

Appellee.

Docket No. 75-2087

APPENDIX TO APPELLANT'S BRIEF

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES DISTRICT COURT

JUDGE PALLACK

Jury demand date:

PRO SE

74 CIV 2836

D. C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
U.S.A. ex rel. RONALD MILLER -v- Supt. Green Haven Correctional Facility; LEON J. VINCENT	For plaintiff: Ronald Miller #19584 Drawer B Stormville, N.Y. 12582 For defendant: Louis J. Lefkowitz 2 World Trade Center New York, N.Y., 10047

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
J.S. 5 mailed x	Clerk	JUL 1	1974	IFP		
J.S. 6 mailed	Marshal					
Basis of Action:	Docket fee					
Writ of Habeas Corpus						
28 USC 2241	Witness fees					
Action arose at:	Depositions					

PRO SE

Miller -V- Vincent

DATE	PROCEEDINGS	Data O Judgmen
7-1-74	Filed petition for writ of Habeas Corpus.	
7-1-74	Filed order granting petitioner to proceed in forma pauperis, Ward, J.	
Jul.29,74	Filed Memo. Endorced: Petitioner's motion for Judgment in defualt is i all respects, denied. Respondents time to answer has been extended to aug.23,1974, Duffy,J.	
ul.29,74	Filed Order extending time of respondent to answer to Aug.23,1974,Duffy.	
ug.9-74	Filed ~~XXXXXXXXXX~~ Respondents affidavit in opposition to petitioners ~~X~~ Application for writ of habeas corpus.	
Sep.19,74	Filed petitioner's affidavit in reply.	
Sep.20,74	Filed notice of assignment to Pollack, J.	
ct.8/74	Filed respondent's supplemental affirmation.	
Nov.20/74	Filed pltff.'s notice of motion re: judgment on the pleadings.	
[illegible] 8=84	Filed memo endorsed on motion petition filed 7-1-74- Petition is dismissed. Pollack, J.	
2/24/75	Filed ~~Notice of Appeal from decision and order of USDC,SDNY denying&dismissing~~ petitioner's petition for writ of habeas corpus,12/17/74 (mn by Pro Se Clk)	

A TRUE COPY
RAYMOND F. BURGHARDT, Clerk
By [signature]
Deputy Clerk

MEMORANDUM

UNITED STATES OF AMERICA ex rel. RONALD MILLER v. LEON J. VINCENT, Superintendent, Greenhaven Correctional Facility Pro Se 74 Civ. 2836 (MP)

This is a petition by a state prisoner for a writ of habeas corpus challenging the validity of only one of the three counts on which he was convicted and/or for the convening of a three judge court. Petitioner was convicted by trial by jury of felony murder, second degree manslaughter, and first degree assault. The trial court set aside the felony murder verdict. The State, but not the petitioner, appealed that decision, and the Court of Appeals ultimately reinstated that verdict. People v. Miller, 32 N.Y.2d 157, 344 N.Y.S.2d 342 (1973). Petitioner subsequently appealed with respect to the felony murder count, and that appeal has been consolidated with his presently pending but unperfected appeal before the Appellate Division with respect to the other two counts.

Petitioner raises essentially four objections: (1) the indictment for felony murder was "fatally duplicitous" in that it also charged him with burglary, (2) he honestly believed that he had been invited to the victim's apartment and that he therefore did not commit burglary, (3) no facts proving a burglary were established, an impermissible presumption having been used, and (4) the Court of Appeals violated its jurisdiction by ruling on a question of fact.

Petitioner is required by 28 U.S.C. §2254(b) to exhaust his state remedies, but has done so only with respect to the sufficiency of the evidence, and his state appeals remain pending before the Appellate Division. Even assuming that he had exhausted his state remedies, he has not established that he is in custody in violation of the Constitution or laws of the United States. 28 U.S.C. §2254(a). The felony murder count was not duplicative and does not raise a constitutional question. Petitioner's "honest belief" that he was an invitee to the apartment was a question for the triers of fact and does not rise to federal

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constitutional dimensions unless there was no proof whatever of the crime charged-- a condition which is not met in this case. Since under New York law the elements of both the death and the predicate felony must be independently established, see People v. Fitzpatrick, 61 Misc. 2d 1043, 308 N.Y.S. 2d 18 (Oneida Co.) (pre-trial motions), writ of prohibition denied 34 App. Div. 2d 730, 311 N.Y.S. 2d 577 (4th Dept.), appeal dismissed 27 N.Y.2d 742, 314 N.Y.S.2d 992 (1970), no presumption is involved in the statute. Nor does the scope of the review by the Court of Appeals in this case suggest a constitutional question.

Petitioner also seeks to invoke a three judge court to challenge the constitutionality of New York Penal Law §140.20, Burglary in the Third Degree. Since this statute was not charged in petitioner's case, he does not have standing to assert a constitutional challenge. If the petition is read as a constitutional challenge to the felony murder statute, Penal Law §125.25(3), it must fall for failure to assert a substantial federal question, either with respect to the sufficiency of the evidence to support a conviction, see Terry v. Henderson, 462 F.2d 1125 (2d Cir. 1972), or with respect to the definition of the elements of a state crime.

The petition must accordingly be dismissed.

SO ORDERED

December 17, 1974

Milton Pollack
U.S. District Judge

U.S. DISTRICT COURT
FILED
DEC 18 1974
S.D. OF N.Y.

THE PEOPLE OF THE STATE OF NEW YORK, Appellant, *v.* RONALD MILLER, Respondent.

Argued January 9, 1973; decided April 26, 1973.

Crimes — felony murder — defendant killed another man in course of and in furtherance of commission of burglary — requirements of felony-murder statute (Penal Law, § 125.25, subd. 3), which includes burglary as predicate for felony murder, satisfied — merger doctrine not extended to facts of this case.

1. The jury could find from the evidence that defendant committed the crime of burglary by knowingly entering unlawfully a man's apartment with the intent to assault that man. Since defendant killed another man in the course of and in furtherance of his commission of burglary, the requirements of the felony-murder statute (Penal Law, § 125.25, subd. 3) which includes, in its list of predicate felonies, the crime of burglary, are satisfied. The felony-murder conviction should be reinstated.

2. The court will not extend the merger doctrine to the facts of this case with the result that the assault on neither man could, for the purposes of the felony-murder statute, be used as the intended crime element of burglary. The considerations which prompted the adoption of the merger doctrine do not justify its extension here.

People v. *Miller*, 39 A D 2d 893, reversed.

APPEAL, by permission of a Justice of the Appellate Division of the Supreme Court in the First Judicial Department, from an order of said court, entered June 27, 1972, which affirmed an order of the Supreme Court (HAROLD BAER, J.; opn. 70 Misc 2d 594), entered in New York County, setting aside that part of a verdict convicting defendant of felony murder.

Frank S. Hogan, District Attorney (*Jonathan Lovett, Michael R. Juviler* and *Bennett L. Gershman* of counsel), for appellant. The evidence at trial established beyond a reasonable doubt defendant's unlawful entry into the deceased's apartment with the intent to commit a crime; therefore, the court committed error in setting aside the felony-murder conviction on the theory that the felony of burglary had not been sufficiently proved. (*People* v. *Hüter*, 184 N. Y. 237; *People* v. *Wagner*, 245 N. Y.

143; *People* v. *Luscomb*, 292 N. Y. 390; *People* v. *Moran*, 246 N. Y. 100.)

Freda S. Nisnewitz, William E. Hellerstein and *Robert Kasanof* for respondent. The trial court correctly set aside the jury's verdict on the first count of the indictment, because the People failed to prove beyond a reasonable doubt that defendant-respondent was guilty of burglary, and because, assuming the existence of such proof, a burglary based upon the crime of assault cannot properly be utilized as the predicate for a felony-murder conviction. (*People* v. *Moran*, 246 N. Y. 100; *People* v. *Hüter*, 184 N. Y. 237; *People* v. *Spohr*, 206 N. Y. 517; *Foster* v. *People*, 50 N. Y. 598; *People* v. *Luscomb*, 292 N. Y. 390; *People* v. *Wagner*, 245 N. Y. 143; *People* v. *Fowlkes*, 24 N Y 2d 274; *People* v. *Sigismondi*, 21 N Y 2d 186.)

JASEN, J. The issue presented upon this appeal is whether a burglary based upon the crime of assault can properly serve as the predicate for a felony-murder conviction.

On the morning of October 25, 1970, the defendant knocked on the door of an apartment directly below his own apartment. When Robert Fennell, one of the occupants, opened the door, the defendant, armed with a butcher knife and a spray can, sprayed at Fennell's face and then stabbed him in the arm. As Fennell backed away, the defendant followed him into the apartment, continuing to spray and stab him. As Fennell tripped and fell to the floor, he shouted to his roommate, Rasul Aleem, to help him. When Aleem responded to Fennell's call and attempted to aid him, the defendant turned and stabbed Aleem in the chest, killing him.

Defendant was indicted for the crimes of felony- and common-law murder of Aleem and attempted murder of Fennell, and was convicted, upon a jury trial, of the felony murder of Aleem, manslaughter in the second degree under the common-law murder count of the indictment, and assault in the first degree under the attempted murder count of the indictment.

The Trial Judge set aside the felony-murder conviction on the ground that the People had not established the commission of the alleged predicate felony—burglary. The Appellate Division affirmed, with one Justice dissenting. From this order the People appeal.

Both the trial court and the majority at the Appellate Division took the position, and the defendant so argues, that the crime of assault, not burglary, was the underlying felony upon which the felony-murder conviction stood, and that since assault is not one of the predicate felonies enumerated in the felony-murder statute, the conviction of felony murder should not be permitted to stand.

The felony-murder statute (Penal Law, § 125.25, subd. 3) includes, in its list of predicate felonies, the crime of burglary. To establish the crime of burglary, it must be shown that the defendant "knowingly enters or remains unlawfully in a building [1] with intent to commit a crime therein." (Penal Law, § 140.20.)

The People's evidence, if believed, established that the defendant went to Fennell's apartment uninvited and armed with a butcher knife and spray can; that when the apartment door was opened, he lunged across the threshold, sprayed Fennell with a choking gas, and attacked him with the knife; and that when Aleem came to Fennell's aid, the defendant fatally stabbed him. We deem this evidence to be legally sufficient for the jury to find that the defendant committed the crime of burglary by knowingly entering unlawfully Fennell's apartment with the intent to assault Fennell. Clearly, had there been no homicide, but merely an unlawful entry by defendant into Fennell's apartment with the intent to assault Fennell, the crime of burglary would have been committed. Thus, since the defendant killed Aleem in the course of and in furtherance of his commission of burglary, the requirements of the felony-murder statute are satisfied.

Defendant would have us extend the merger doctrine to the facts of this case with the result that neither the assault on Fennell, nor the assault on Aleem, could, for the purposes of the felony-murder statute, be used as the intended crime element of burglary. The considerations which prompted our court to announce the merger doctrine do not justify its extension here. We developed this doctrine to remedy a fundamental defect in the old felony-murder statute (Penal Law of 1909, § 1044). Under that statute, *any* felony, including assault, could be the

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1. "Building" is defined to include an apartment within a building. (Penal Law, § 140.00, subd. 2.)

predicate for a felony murder. Since, a fortiori, every homicide, not excusable or justifiable, occurs during the commission of assault, every homicide would constitute a felony murder.

This defect was remedied by the Legislature in 1965 by including in the revised Penal Law a list of specified felonies — all involving violence or substantial risk of physical injury — as the only felonies forming a basis for felony murder.[2] The legislative purpose for this limitation was "to exclude from felony murder, cases of accidental or not reasonably foreseeable fatality occurring in an unlikely manner in the course of a non-violent felony." (Denzer and McQuillan, Practice Commentary, McKinney's Cons. Laws of N. Y., vol. 39, p. 236.)

It should be apparent that the Legislature, in including burglary as one of the enumerated felonies as a basis for felony murder, recognized that persons within domiciles are in greater peril from those entering the domicile with criminal intent, than persons on the street who are being subjected to the same criminal intent. Thus, the burglary statutes prescribe greater punishment for a criminal act committed within the domicile than for the same act committed on the street. Where, as here, the criminal act underlying the burglary is an assault with a dangerous weapon, the likelihood that the assault will culminate in a homicide is significantly increased by the situs of the assault. When the assault takes place within the domicile, the victim may be more likely to resist the assault; the victim is also less likely to be able to avoid the consequences of the assault, since his paths of retreat and escape may be barred or severely restricted by furniture, walls and other obstructions incidental to buildings.[3] Further, it is also more likely that when the assault occurs in the victim's domicile, there will be present family or close

2. The list of specified felonies is: robbery, burglary, kidnapping, arson, rape in the first degree, sodomy in the first degree, sexual abuse in the first degree, escape in the first or second degree. (Penal Law § 125.25, subd. 3.)

3. The facts of *People* v. *Wilson* (1 Cal. 3d 431), a case whose reasoning and holding we reject, illustrate this point. The victim and several other persons were present in the victim's apartment. The victim heard the assailant break into the apartment building vestibule, whereupon she called the police and attempted unsuccessfully to load a pistol. The assailant then broke into the apartment and ordered everyone but the victim to leave, while the victim sought refuge in the bathroom. The assailant shot the bathroom door off its hinges, walked into the bathroom, and shot the victim to death.

friends who will come to the victim's aid and be killed. Since the purpose of the felony-murder statute is to reduce the disproportionate number of accidental homicides which occur during the commission of the enumerated predicate felonies by punishing the party responsible for the homicide not merely for manslaughter, but for murder (see Model Penal Code, Tent. Draft No. 9, pp. 37, 38), the Legislature, in enacting the burglary and felony-murder statutes, did not exclude from the definition of burglary, a burglary based upon the intent to assault, but intended that the definition be " satisfied if the intruder's intent, existing at the time of the unlawful entry or remaining, is to commit *any* crime ". (Denzer and McQuillan, Practice Commentary, McKinney's Cons. Laws of N. Y., vol. 39, p. 355; emphasis supplied.)

Accordingly, the order of the Appellate Division should be reversed, the verdict reinstated, and the case remitted to the trial court for sentencing.

JONES, J. (concurring). I agree that the order of the Appellate Division should be reversed and the verdict of conviction reinstated.

In my view, however, this result should here be predicated on the narrower ground that even under the old law, when the doctrine of merger was in full bloom, a conviction of felony murder was sustained where the underlying offense was assault if the assault was committed on a person other than the one killed. (*People* v. *Wagner*, 245 N. Y. 143; *People* v. *Patini*, 208 N. Y. 176; *People* v. *Giblin*, 115 N. Y. 196; *People* v. *Miles*, 143 N. Y. 383; *semble contra*, *People* v. *Spohr*, 206 N. Y. 516; see 1937 Report of N. Y. Law Rev. Comm., p. 681, p. 654, n. 366.)

In this case, the evidence justified the jury finding that knowingly the defendant unlawfully entered Fennell's apartment with intent to commit an assault on Fennell, thus establishing the underlying crime of burglary, one of the felonies included in the list of predicate felonies specified in our felony-murder statute (Penal Law, § 125.25, subd. 3). While the burglary was still under way (cf. *People* v. *Smith*, 232 N. Y. 239), Aleem who had not theretofore been involved in the assault, responded to Fennell's calls for help. The defendant then, in the course of and in furtherance of the burglary caused the death of Aleem.

Points of Counsel

I do not find it necessary here to go further.

Chief Judge FULD and Judges BURKE and WACHTLER concur with Judge JASEN; Judge JONES concurs in a separate opinion in which Judge GABRIELLI concurs; Judge BREITEL taking no part.

Order reversed, verdict reinstated and case remitted to Supreme Court, New York County, for further proceedings in accordance with opinion herein.

9 The People of the State of New York, Respondent, v. Ronald Miller, Appellant.—Order, Supreme Court, New York County, entered on November 8, 1971, setting aside a murder conviction, affirmed. We agree with the learned Trial Justice that a conviction of felony murder, under the particular facts and circumstances of this case, should not be permitted to stand. Assault is not one of the specified felonies forming a basis for felony murder (Penal Law, § 125.25, subd. 3); and the evidence adduced on the trial should "not be warped or strained" to find another independent felony in order to sustain this conviction. (Cf. *People* v. *Moran*, 246 N. Y. 100, 105.) Such was not the intention of the legislature. As noted in the Practice Commentary to the above-cited Penal Law section (McKinney's Cons. Laws of N. Y., Book 39, § 125.25, p. 236), the purpose of enumerating the underlying felonies upon which felony murder may be based "is to exclude * * * cases of accidental or not reasonably foreseeable fatality occurring in an unlikely manner in the course of a non-violent felony". Concur—Stevens, P. J., McGivern, Kupferman and Murphy, JJ.; McNally, J., dissents in the following memorandum: I dissent and vote to reverse and reinstate the verdict of guilty on the first count. Defendant was indicted on three counts: (1) murder as a felony murder; (2) common-law murder; and (3) attempted murder. The evidence enabled the jury to find that defendant on the morning of October 25, 1970 knocked on the door of an apartment shared by Robert Fennell and Rasul Aleem. Fennell opened the door and saw the defendant holding a spray can in his left hand and a butcher knife in his right. While standing at the door defendant sprayed Fennell's face with a "choking gas" and stabbed his right arm. Defendant followed Fennell into the apartment continuing to spray and stab Fennell. Aleem came to the assistance of Fennell. Thereupon the defendant stabbed and killed Aleem. The jury found defendant guilty of felony murder and manslaughter in the second degree as to Aleem, and assault in the first degree as to Fennell. After the verdict the court set aside the conviction of felony murder. The People appeal from the dismissal of the first count grounded on the felony murder. In my opinion, the trial court erred in holding the evidence failed to establish burglary. "A person is guilty of burglary in the third degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein." (Penal Law, § 140.20.) "A person is guilty of burglary in the second degree when he knowingly enters or remains unlawfully in a building with intent to commit a crime therein, and when: 1. In effecting entry or while in the building or in immediate flight therefrom, he or another participant in the crime: (a) Is armed with explosives or a deadly weapon; or (b) Causes physical injury to any person who is not a participant in the crime; or (c) Uses or threatens the immediate use of a dangerous instrument; or 2. The building is a dwelling and the entering or remaining occurs at night." (Penal Law, § 140.25.) The evidence of the People, credited by the jury, establishes defendant's entry in the apartment was unlawful within the meaning of the Penal Law. The trial court predicated the dismissal on the alleged failure to establish a burglary. The trial court may not set aside a verdict, except as a matter of law, and, therefore, may not decide an issue of fact inconsistent with the verdict. (CPL 330.30.) Subdivision 3 of section 125.25 of the Penal Law defines a felony murder where one "commits or attempts to commit * * * burglary * * * and, in the course of * * * such crime * * *

causes the death of a person other than one of the participants". (*People* v. *Schermerhorn*, 203 N. Y. 57.) Implicit in the verdict is the fact defendant killed Aleem in the course of the commission of the crime of burglary. Accordingly, the verdict on the first count should be reinstated. Defendant contends the assault merged in the homicide. However, this is not so as to the burglary. Moreover, in the past, where assault was the predicate for a felony murder, our courts consistently held that the intent to assault the initial victim does not merge in the homicide of a third person. (*People* v. *Wagner*, 245 N. Y. 143; *People* v. *Luscomb*, 292 N. Y. 390.) [70 Misc 2d 594.]

"Exhibit A"

OPINION SETTING ASIDE VERDICT

SUPREME COURT

New York County

Trial Term-Part 32

Ind. No. 6260 - 1970

*****

The People of The State of New York,

against

RONALD MILLER,

Defendant.

*****

Harold Baer, J.:

This is a motion to set aside the verdict of a jury entered on July 23, 1971. In addition to the motion brought on by counsel, the defendant has written several letters requesting the same relief. All of the letters are considered as part of this motion.

There are three counts in this indictment. The first two counts are in relation to the deceased victim. The first count charges Murder while in the Commission of a Felony (Burglary); the second count charges Common Law Murder; the third count is for Assault on the other victim of the crime charged.

The jury convicted the defendant of Murder on the first count; Manslaughter in the Second Degree on the second count; and Assault in the First Degree on the third count. This was a conscientious, intelligent jury and the verdict was proper under the Court's charge. There were no exceptions to the charge or were there any requests to charge.

The motion to set aside the entire verdict and for a new trial is denied. There was ample evidence for the jury to find the defendant guilty beyond a reasonable doubt of Manslaughter in the Second Degree and Assault in the First Degree under the second and third counts of the indictment. However, the motion with respect ot the first count charging Felony Murder will be considered. That count was predicated upon the Commission of a Homicide during the course of a Burglary.

Burglary is defined in the Penal Law as entering and remaining in a building unlawfully; knowingly so entering and remaining without privilege or license to do so, and with intent to commit a crime therein (P.L. 140). The evidence is to the contrary. Mattie Ziegler testified that the defendant was asked to come down to the victim's apartment (R. at pages 163,165,167,168,169). Furtheremore

one of the victims, Fennell, testified that he opened the door after the defendant knocked (R. page 241). Nowhere in the record is there credible evidence to sustain an intent to commit a burglary. The People have failed to prove the Burglary beyond a reasonable doubt. Certainly, the felony that eliminates the intent necessary for homicide must be one that is independent of the homicide and of the assault merged therein (Peo. v. Huter, 184 N.Y. 237; Peo. v. Wagner, 245 N.Y. 143; Peo. v. Moran, 246 N.Y. 100, 102).

"Exhibit H"

The jury found the defendant guilty of Manslaughter in the Second Degree. They agreed unanimously that there was no intent to murder but death was caused by reckless conduct of the defendant. There is no justification for the first count of this indictment. There is no evidence to sustain it. This Court did not dismiss the first count of the indictment at the end of the People's case because of the insistence of the People that the burglary had been proved beyond a reasonable doubt. After reviewing the record, this Court disagrees. It does not serve the ends of justice to stretch the legislative intent in regard to Felony Murder. Judge Cardozo said in People v. Moran, supra, "Evidence uncertain in its implications must not be warped or strained to force a jury into the dilemma of choosing between death and freedom" (at page 105). This defendant never intended to burglarize. Perhaps assault was intended, but assault is not one of the included crimes from which Felony Murder may evolve (P.L. 125.25 (3)). In the interest of justice, the first count of the indictment is dismissed. That part of the motion to set aside the verdict as to the first count of the indictment and to dismiss that count is granted.

Dated, Nov. 8, 1971.

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"EXHIBIT A"

CERTIFICATE OF SERVICE

2/21/55, 19

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

E. Thomas Boyle